

7/27/01

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

VS.

PAUL F. POLISHAN

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3:CR-96-274

(CHIEF JUDGE VANASKIE)

MEMORANDUM

Following a 35-day non-jury trial and more than one week of deliberations, during which the voluminous record in this matter was studied extensively, I found defendant Paul F. Polishan guilty on 18 of 20 counts of an indictment accusing him of orchestrating a massive fraud of the financial accounting of the Leslie Fay Companies, Inc. Mr. Polishan has now moved for judgment of acquittal or, alternatively, a new trial, contesting the sufficiency of the evidence and essentially requesting that the verdict be reconsidered. Additionally, Mr. Polishan claims an entitlement to a new trial on the ground that the Magistrate Judge supervising discovery in this complex prosecution erred in (a) finding that the government's "open file policy" satisfied its obligation under Brady v. Maryland, 373 U.S. 83 (1963), and (b) in not according Mr. Polishan access to the government file between the close of a two-year discovery period and the commencement of the trial.

Having undertaken a laborious re-examination of the record in this matter, I find that Mr. Polishan's challenge to the sufficiency of the evidence, considered under both the standard of deference accorded verdicts challenged by way of a motion for judgment of acquittal as well as the more searching inquiry pertaining to a motion for a new trial, is without merit. As to Mr. Polishan's challenges to the Magistrate Judge's discovery rulings, I find that Mr. Polishan waived further judicial consideration of those issues by not timely requesting review of the Magistrate Judge's rulings, and that, in any event, Mr. Polishan's complaints concerning the discovery rulings and the government's compliance with the Brady rule are baseless. Accordingly, Mr. Polishan's post-verdict motions will be denied.

I. BACKGROUND

A. Procedural History

On October 29, 1996, the Grand Jury for this District returned an indictment charging Mr. Polishan with having conspired to falsify the books and records of the Leslie Fay Companies, Inc. ("Leslie Fay"). The conspiracy was alleged to have resulted in the substantial overstatement of net income for Leslie Fay, a publicly-traded corporation, for the years 1990, 1991, and 1992. During this period of time, Mr. Polishan was Leslie Fay's Senior Vice-President of Finance, Chief Financial Officer and Chief Accounting Officer. In addition to the charge of conspiracy contained in Count 1 of the Indictment, the Grand Jury charged Mr. Polishan with

seven counts of making false and fraudulent material statements and representations in a matter within the jurisdiction of the United States Securities and Exchange Commission in connection with the filing of various SEC Form 10Q and 10K statements, in violation of 18 U.S.C. § 1001 (Counts 2 through 8); one count of fraud in connection with the sale of securities, in contravention of SEC Rule 10b-5 (Count 9); bank fraud, in violation of 18 U.S.C. § 1344 (Count 10); and ten counts of wire fraud in connection with the issuance of various press releases concerning Leslie Fay earnings, in violation of 18 U.S.C. § 1343. (Counts 11 through 20.)

The indictment followed an investigation undertaken by Leslie Fay's Audit Committee. In September of 1993, Leslie Fay's Audit Committee issued a 369-page report, which concluded that unsupported entries on the Leslie Fay general ledger resulted in an overstatement of pre-tax net income of more than \$75 million for the years 1990 through 1992. The Audit Committee Report did not make a determination as to whether Mr. Polishan was a culpable participant in the fraud, but did detail the evidence that suggested such a conclusion. The most damaging evidence was the confession of Mr. Polishan's direct subordinate, Donald F. Kenia, who was Leslie Fay's Corporate Controller.

At the time that the accounting irregularities were initially disclosed (the end of January, 1993), Mr. Kenia claimed full responsibility and expressly denied that Mr. Polishan was a culpable participant. Approximately two weeks after the fraud was disclosed, Mr. Kenia stated

that Mr. Polishan was responsible for directing the illegal conduct. Mr. Kenia initially implicated Mr. Polishan during an interview conducted by attorneys and accountants retained by the Leslie Fay Audit Committee to investigate the matter. Mr. Kenia also named Mr. Polishan as the director of the fraud in interviews conducted by federal law enforcement authorities. In October of 1994, Mr. Kenia pled guilty to a two-count information charging him with violations of 18 U.S.C. § 1001 in connection with the filing of fraudulent 10K and 10Q statements during 1991 and 1992.

The return of the indictment in October of 1996 was also preceded by the filing of securities fraud class actions in which Mr. Polishan was named as a defendant. Mr. Polishan was represented by counsel in the class action litigation. The return of the indictment also followed an investigation undertaken by the SEC.

On November 21, 1996, Mr. Polishan was arraigned. By Order dated November 25, 1996, United States Magistrate Judge Thomas M. Blewitt was appointed as “Special Master” to preside over what was anticipated to be lengthy discovery. Thereafter, previously scheduled dates for completion of discovery, filing of motions and commencement of trial were postponed indefinitely so as to enable the defense to undertake the requisite review of the government’s extensive file.

The government adopted an “open file” policy in this case, making available to the defense all material with the exception of attorney work product and other privileged items. The

defense copied approximately twenty banker boxes of the approximately 150 boxes of materials produced by the government. The defense also had available to it the Audit Committee Report as well as voluminous materials generated during the securities fraud litigation and SEC investigation, including transcripts of those who provided testimony in those proceedings.

Over a period of two years, Magistrate Judge Blewitt conducted several status conferences. In a written joint status report dated February 26, 1997, counsel represented that estimates for the cost of photocopying, imaging, coding or otherwise processing the voluminous documents ranged from \$12,000 to \$270,000, “depending on the number of documents processed and the level of document retrieval sought.”¹ Accompanying the joint status report was a three-page “inventory” prepared by defense counsel, generically describing the contents of the boxes and binders of materials made available by the government.²

On November 24, 1997, one year after Mr. Polishan was arraigned, Magistrate Judge Blewitt set May 11, 1998 as the discovery deadline. The discovery deadline was subsequently extended to August 11, 1998.

¹According to the government, the defense rejected the government’s offer to share the cost of copying the documents.

²According to the government, the documents generally consisted of materials generated by the Leslie Fay Audit Committee during its investigation; discovery material, including transcripts of testimony, generated during the securities fraud litigation and SEC investigation; Leslie Fay SEC filings; accounting work papers; FBI interview reports; bank records; tax records; and other miscellaneous records.

During this lengthy period for discovery, Mr. Polishan was seeking to obtain funding of defense costs through insurance that had been procured by Leslie Fay. At no time, however, did Mr. Polishan request public funding of the costs of obtaining a complete copy of the documentation made available by the government.

Litigation commenced by the Leslie Fay insurer in the New York State courts resulted in a determination that the insurance company was not obligated to advance costs for the defense of this criminal prosecution. On July 14, 1998, Mr. Polishan filed in this matter a motion seeking to require the insurance company to advance his defense costs or to reimburse Leslie Fay for its funding of Mr. Polishan's defense costs. By Memorandum and Order filed on September 10, 1998, Mr. Polishan's motion was denied and the Clerk of Court was directed to remand the matter to United States Magistrate Judge Blewitt for the conclusion of discovery proceedings.

By Order filed on September 28, 1998, Magistrate Judge Blewitt set December 15, 1998 as the discovery deadline. Pretrial motions were directed to be filed by January 5, 1999. The Order stated that "[n]o further extensions of these deadlines will be granted under any circumstances."

On January 5, 1999, the defendant filed an "Omnibus Pretrial Motion," seeking suppression of evidence, challenging the indictment, requesting a non-jury trial, and raising discovery issues. The discovery-related issues were assigned to Magistrate Judge Blewitt.

Although acknowledging that the government had made available for inspection and

copying approximately 650,000 to 1.2 million pages of documents, and that the defense had copied approximately 20 boxes of material, the defense maintained that its access to the government document repository for a period of approximately 2 years was inadequate. The defense requested that the Court establish a document “depository,” to which both the defense and the government could have access as trial preparations continued. In addition, Mr. Polishan asked that the government be required to identify with specificity and produce in advance of trial “any evidence in the hands of the government which is favorable to the defendant and material to [the] question of his alleged guilt.” (Omnibus Pretrial Motion at p.12, ¶ 54.)

On March 9, 1999, Magistrate Judge Blewitt conducted oral argument on the discovery-related issues. By Order filed March 11, 1999, Magistrate Judge Blewitt, inter alia, denied the request for a document depository, but allowed the defense “to make individual requests for specific documents as the need for same becomes known” (Order of March 11, 1999 at 2.) Magistrate Judge Blewitt also denied the request to require the government to identify with specificity Brady material, finding that “the Government has complied with its *Brady* obligations by providing a complete open file to the Defendant for more than two (2) years.” The defense did not appeal the Magistrate Judge’s discovery rulings.

By Order dated March 12, 1999, the non-discovery issues raised in the defense Omnibus Pretrial Motion were addressed. Defendant’s motions to suppress evidence, to dismiss the indictment, and for a James hearing were denied. Its motion for a non-jury trial, in which counsel

for the government concurred, was granted, and trial was scheduled to commence in September of 1999.

In July of 1999, the defense requested and obtained an adjournment of trial to afford more time for the preparation of a report by defendant's accounting experts. During a status conference conducted on October 15, 1999, defense counsel indicated that they could be prepared to commence trial in March of 2000. Also during the conference call, the government suggested that defense counsel review the government's pre-marked exhibits to enable stipulations of authenticity. By Order dated October 20, 1999, the parties were directed to exchange expert witness reports by Friday, January 21, 2000, and trial was scheduled to commence on March 1, 2000.

On December 29, 1999, defendant applied ex parte for public funding of the fees and expenses of the accounting firm that had been retained on behalf of the defendant, Goldstein Golub Kessler, LLP.³ By sealed Order dated January 10, 2000, the ex parte application was granted. By Order dated January 21, 2000, the deadline for exchange of expert witness reports was extended to February 14, 2000, but the trial commencement date of March 1, 2000 remained unchanged.

B. Factual Background

³This was the only application for public funding of defense costs made in this protracted case. Notably, this application was explicitly limited to the fees and expenses of Goldstein Golub Kessler, and did not seek funding to copy the government's file.

In connection with the trial, the defense stipulated to the admissibility of many exhibits as well as the truth and accuracy of a number of the paragraphs of the Indictment, indicating that all averments stipulated as truthful and accurate “shall be deemed proven beyond a reasonable doubt” In this regard, it was stipulated that Leslie Fay considered itself to have been a leading producer of women’s apparel in the United States, employing approximately 4,200 persons in 1992. Mr. Polishan had been an employee of Leslie Fay since 1969, ascending to the position of Senior Vice President of Finance in 1987. It was further agreed that Mr. Polishan supervised a number of individuals associated with the financial operations of Leslie Fay, including the corporate controller, the assistant corporate controller, and the controllers responsible for the different divisions within Leslie Fay. It was also agreed that Mr. Kenia had been an employee of Leslie Fay since 1976, and had served directly under Polishan since 1978.

The defense further stipulated that on February 1, 1993, Leslie Fay announced that its Audit Committee had undertaken an investigation into alleged accounting irregularities that could necessitate a restatement of Leslie Fay’s 1991 earnings and the elimination of any profit for 1992. Mr. Polishan also stipulated that the Audit Committee eventually concluded that there were a number of unsupported entries made to Leslie Fay’s accounting books and records, the cumulative effect of which was to overstate Leslie Fay’s earnings for 1990 by almost \$5 million, for 1991 by more than \$15 million, and for 1992 by more than \$55 million. It was further stipulated that the Leslie Fay Audit Committee had quantified the overstatement of income only

from unsupported entries, and that additional adjustments were to be made to Leslie Fay's financial statements because of Leslie Fay's deviation from Generally Accepted Accounting Principles ("GAAP").

At trial, Mr. Polishan did not dispute the fact that a massive fraud had occurred. The evidence presented at trial showed that the fraud consisted principally of recording unsupported entries in the company's general ledgers to inflate the value of assets, (chiefly inventory), and understating expenses, (chiefly accounts payable and accrued liabilities). Mr. Polishan contended that the fraud was orchestrated by corporate controller Kenia with the assistance of divisional controllers, and that he had no knowledge of the fraud until he purportedly discovered its existence in late January of 1993.

At trial, the government presented compelling testimony that Mr. Polishan's claim of ignorance of the fraud was a prevarication. The evidence showed that Mr. Polishan was completely familiar with the company's intricate financial books and records. He had designed the formats for the periodic reports generated by the financial staff. Moreover, he ruled the financial department with an iron fist, leading by fear and intimidation. The witnesses testified, in particular, about his domination of Mr. Kenia. Particularly poignant was the testimony of Roger Vallecorse, a human relations specialist, who stated that in the Fall of 1992 Mr. Polishan required Mr. Kenia to state to Mr. Vallecorse that "I [Kenia] am a f---ing idiot." Several divisional controllers provided testimony that entries on a report for the period ending June 27, 1992 in Mr.

Polishan's handwriting resulted in unsupported entries being made to achieve the results reflected in Mr. Polishan's handwritten numbers. Several witnesses confirmed that Mr. Polishan and Mr. Kenia would meet at the company offices on Sundays. Mr. Kenia explained that the Sunday meetings were intended to determine the results that the fraud would achieve.

While there was no evidence that Mr. Polishan had himself made an unsupported entry on Leslie Fay's general ledger, the government introduced evidence showing that Mr. Polishan had caused the inflation of Leslie Fay earnings by other means. For example, a number of witnesses testified that invoices for several million dollars of goods were generated in late 1991, but the goods were not shipped until early 1992, thereby overstating the company's financial performance for 1991. Several Leslie Fay employees testified that Mr. Polishan had directed this fraudulent conduct. There was also evidence that the reserves for inventory and customer claims (referred to as "chargeback reserves") were set by Mr. Polishan at unrealistically low levels, thereby improving Leslie Fay's bottom line. William Perkoski, a controller of one of Leslie Fay's divisions, testified that Mr. Polishan directed him to change the aging treatment of inventory, making the inventory more current than it was and thereby inflating its value. John Dillon, another divisional controller, testified that in January of 1991 Mr. Polishan refused to set a reserve for a division because it would reduce earnings. Another divisional controller testified that he had been directed to capitalize an expense, thereby inflating earnings.

In connection with the accounting treatment of the gain on the 1991 sale of a Leslie Fay

division -- HEAD -- the government produced memoranda prepared by Mr. Polishan stating that he had “inflated” company reserves “to protect future operations against adverse results,” and that he had “enumerated as much as he could against the gain, moving it to operating income.” The evidence showed that the capital gain from the sale of the division was understated by approximately \$2.5 million and the operating results of other ongoing divisions inflated by that approximate amount. In other words, a one-time capital gain had been reduced and the results of other operating divisions fraudulently inflated to make the company appear to be performing better than it was.

The government’s key witness, of course, was Mr. Kenia. He explained that Mr. Polishan directed the accounting treatment of the sale of the HEAD division in order to portray more favorable results of operating divisions. Mr. Kenia also presented detailed testimony as to the directions he received from Mr. Polishan to manipulate accounting entries to obtain desired results. If Mr. Kenia’s testimony was found to be credible, a guilty verdict was inescapable.

Mr. Polishan took the stand in his own defense. He denied knowledge of the fraud, contending that Kenia had acted on his own. With respect to the memoranda he had prepared on the sale of the HEAD division, indicating that reserves were being “inflated,” and capital gain was being “moved” to operating income, Mr. Polishan contended that he had made a “poor choice of words.” While not disputing that approximately \$2.5 million of the capital gain on the sale of the division had been moved to inflate results of other divisions, he claimed that he was

unaware that the manipulations had occurred.

Ultimately, I concluded that there was sufficient evidence to find Mr. Kenia's testimony believable beyond a reasonable doubt. Mr. Polishan's explanations were implausible and unsubstantiated. He denied the "f___ing idiot" story related by both Mr. Vallecorse and Mr. Kenia. Unlike Mr. Kenia, Mr. Vallecorse had no motive to fabricate this unique incident that afforded meaningful insight into Mr. Polishan's domination of Mr. Kenia. Mr. Polishan also denied telling Mr. Vallecorse that he (Polishan) felt responsible for creating the financial results of the company, as opposed to simply reporting the results. Mr. Vallecorse struck me as a very credible witness without any motive to lie. Mr. Polishan denied the invoicing of goods before shipment that occurred at the end of 1991, but at least three witnesses (Erickson, Weinstein and Kenia) all testified as to its occurrence. Neither Weinstein nor Erickson was part of the financial staff, and were found by me to be credible witnesses.

Also compelling a finding that Mr. Polishan was not to be believed was his account of his alleged "uncovering" of the fraud. Both Kenia and Polishan agreed that Kenia had been delinquent in providing audit packages for Leslie Fay's outside auditors who were present at the Leslie Fay offices in late January of 1993 to audit the books and records for 1992. Both agree that there was an encounter late in the afternoon of Thursday, January 28, 1993 on this issue. According to Kenia, he told Polishan during that encounter that he could not cover the more than \$20 million in unsupported entries that had been made. According to Kenia, Polishan then said

that Kenia would have to fix the problem and Polishan left the office. According to Polishan, when Polishan confronted Kenia about not having produced the audit packages, Kenia said that there is a problem with the financial statements and that the financial performance of the company had been inflated by about \$29 million. Polishan contends that when Kenia observed Polishan getting red, Kenia said that there was a “tax problem” that could explain the error. Polishan then decided to go home, leaving Kenia to find the “tax problem.” Significantly, Polishan did not alert anyone else at Leslie Fay of Kenia’s disclosure. Later that evening, Polishan called Kenia to ask if he had found the error, to which Kenia replied in the negative. The next morning, Polishan met with his attorney and asked for advice about the situation. His attorney advised Polishan that he should confront Kenia with a non-accounting staff person present as Polishan’s witness. Both Kenia and Polishan are in agreement that on the morning of January 29th, Polishan met with Kenia alone, contrary to the advice Polishan had received from his lawyer. According to Kenia, Polishan, after learning that Kenia had been unable to “fix” the problem, stated that Kenia was “on his own.” Polishan acknowledges that he stated to Kenia that Kenia was “on his own.” Both Polishan and Kenia are in agreement that Kenia left Polishan’s office. Polishan then summoned Terry Erwine into Polishan’s office and called for Kenia. With Erwine now present, Polishan told Kenia to tell Erwine what Kenia had been doing. At this point, Kenia acknowledged the commission of the fraud and took sole responsibility.

The fact that Polishan did not disclose to others at Leslie Fay Kenia’s alleged admission

during the afternoon of January 28, his apparent readiness to accept some undefined tax problem as the source of the error, despite his intimate familiarity with the financial affairs of Leslie Fay and the size of the overstatement of income, combined with the fact that Polishan saw his attorney and discussed the matter of Kenia's disclosure, and then confronted Kenia without an independent witness present, disregarding the advice he had just received from his attorney, all weigh against Mr. Polishan's credibility. His muted reaction to Mr. Kenia's statement that the financial results had been overstated by more than 20 million dollars, his immediate departure from the office without working to find the alleged "tax problem," his checking in with Kenia during the evening of January 28th, his meeting with his lawyer on the morning of January 29th, his one-on-one encounter with Kenia on the morning of January 29th and his complete domination of Kenia combined to compel a determination that Mr. Polishan's self-proclaimed discovery of the fraud was a fabrication. Mr. Polishan's handling of the events of January 28th and 29th indicated that he had directed the fraud, hoped that Mr. Kenia would find a way to cover the fraud, but if he could not, Mr. Polishan would find a way to distance himself from Mr. Kenia. Thus, when he learned on the morning of the 29th that Mr. Kenia could not find a way to hide the fraud from the auditors, Mr. Polishan informed Mr. Kenia that he was on his own and then had Mr. Kenia acknowledge responsibility in the presence of a third person, just as he had Mr. Kenia say that he was a "f____ing idiot" in the presence of a third person just a few months prior to this incident.

Mr. Polishan's testimony in other material respects was found not to be credible. For

example, I found that, contrary to his explanations, company reserves were deliberately manipulated to achieve financial results. The evidence showed that Mr. Polishan alone was responsible for setting the reserves.

In summary, recognizing that Mr. Kenia was a biased witness who had indeed initially accepted full responsibility for the fraud, and had admittedly engaged in the fraud, I scrutinized the evidence to assure myself that his testimony was credible beyond a reasonable doubt. I found that his testimony was corroborated by testimony of a number of other witnesses as well as documentary evidence presented in the case. Thus, after much deliberation, I found that the government had carried its burden of proof on 18 of the 20 counts in issue.⁴ A general verdict was returned on July 5, 2000.⁵

⁴Mr. Polishan was found not guilty on two wire fraud counts that concerned issuance of press releases in June of 1992 concerning the announcement of Leslie Fay's intention to buy back shares of the company .

⁵Rule 23(c) of the Federal Rules of Criminal Procedure provides:

In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

During the course of the trial, I inquired as to whether the prosecution or defense was requesting that findings of fact be made in this matter. Both sides indicated that they were not requesting that the court find the facts specially; both sides agreed that a general verdict should be returned.

(continued...)

Immediately following the delivery of the verdict, I granted defendant's motion to extend the time for filing a motion for a new trial until August 14, 2000. By Order dated August 10, 2000, the time for filing post-verdict motions, other than a motion for new trial, was extended to September 13, 2000. On August 14, 2000, Mr. Polishan moved for a new trial, asserting that the verdict was contrary to the weight of the evidence and that "[a] fully informed adjudication of this case did not occur due to limitations on the defendant's ability to adequately prepare and present his defense," with the primary limitation being the "inability to locate, obtain and analyze the voluminous documentary evidence needed for an adequate defense" (Motion for New Trial (Dkt. Entry 198) at 1.) On September 13, 2000, defendant filed an "Omnibus Post-Verdict Motion," including a motion for judgment of acquittal, motion for reconsideration and motion for new trial. Briefing on the post-verdict motions has been completed and this matter is ripe for disposition.

II. DISCUSSION

A. Motion for Judgment of Acquittal

Mr. Polishan contends that the evidence was insufficient to sustain a conviction on any of the counts in this indictment. "When reviewing a claim of insufficiency of the evidence, 'the

⁵(...continued)

standard of review is exactly the same regardless of whether the verdict was rendered by a jury or by a judge after a bench trial.” United States v. Pierce, 224 F.3d 158, 164 (2d Cir. 2000). Accord, United States v. Barletta, 565 F.2d 985, 991 (8th Cir. 1977); United States v. Carter, 311 F.2d 934, 940 (6th Cir.), cert. denied sub nom., Felice v. U.S., 373 U.S. 915 (1963). “In reviewing the sufficiency of the evidence after a bench trial, ‘the test is “whether the evidence is sufficient to justify the trial judge, as trier of fact, in concluding beyond a reasonable doubt, that the defendant was guilty.”’ United States v. Doe, 226 F.3d 672, 680 (6th Cir. 2000), cert. denied, 121 S.Ct. 840 (2001). As in the case of a jury verdict, the evidence must be examined in the light most favorable to the government, with all conflicts in the testimony resolved in favor of the government and all reasonable inferences drawn in its favor. Id. Accord, United States v. Pierce, 224 F.3d at 164; United States v. Adams, 174 F.3d 571, 578 (5th Cir. 1999); United States v. Ismail, 97 F.3d 50, 55 (4th Cir. 1996). “[T]he evidence need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a [judge] could find the defendant guilty beyond a reasonable doubt.” United States v. Casper, 956 F.2d 416, 421 (3d Cir. 1992). “The evidence is to be viewed ‘not in isolation but in conjunction.’” United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984). Consequently, the burden on a defendant who raises a challenge to the sufficiency of the evidence is extremely high. United States v. Helbling, 209 F.3d 226, 238 (3d Cir. 2000), cert. denied, 121 S.Ct. 833 (2001).

In this case, the defendant cannot sustain the heavy burden of demonstrating that, when

viewed in the light most favorable to the government, the evidence was insufficient to sustain the finding of guilty beyond a reasonable doubt on any of the 18 counts on which he was convicted. As the government observes, “the testimony of Don Kenia alone is sufficient to sustain the verdict even without considering the fact that his testimony was corroborated by numerous other witnesses as well as substantial documentation.” (Government Response to Defendant’s Omnibus Post-Verdict Motion (Dkt. Entry 211) at 24.) Mr. Kenia’s testimony established an agreement or understanding between him and Mr. Polishan to falsify the books and records of Leslie Fay for the purpose of inflating its financial results. His testimony also served to show that overt acts were performed both by him and by Polishan to further the purposes of the agreement or understanding. Viewed in the light most favorable to the government, the evidence was plainly sufficient to sustain a determination, beyond a reasonable doubt, that Mr. Polishan had entered into a conspiracy, as charged in the indictment, in violation of 18 U.S.C. § 371.

The evidence also established that quarterly and annual filings required by the SEC, which are the subject of Counts 2 through 8 of the Indictment, contained fraudulent material statements, that Mr. Polishan knew the government-required filings falsely depicted Leslie Fay’s financial performance, and that he nonetheless caused the 10Q and 10K Forms to be filed. The submission of the fraudulent 10Q and 10K Forms, as well as press releases that touted the fraudulently inflated results of Leslie Fay and telephone conference calls with members of the investment community in which Mr. Polishan participated and which also reiterated results of the

company's financial performance that Polishan knew to be false, amply sustain the securities fraud conviction on Count 9 of the Indictment.

As to the bank fraud charge in Count 10 of the indictment, Mr. Polishan argues that “[b]ased on the originally reported 1991 and 1990 financial statements, the company had sufficient cushion, with respect to bank balances and ratios, that the false entries would not have had any effect on the company’s debt compliance.” (Brief in Support of Omnibus Post- Verdict Motion (Dkt. Entry 208) at 12.) Mr. Polishan further argues:

The government presented no evidence that the defendant knew Leslie Fay’s 1992 10Qs were misstated to a great enough extent that the company risked defaulting on any of its loans. Nor did the government present any evidence that the banks would have refused to provide Leslie [Fay] financing if they had originally received 10Qs that had not been inflated. The government did not present any evidence indicating that the defendants specifically intended to expose the banks to any loss whatsoever. The government did not present sufficient evidence to prove any actual or potential loss to the banks. The evidence indicates the banks were merely coincidental recipients of Leslie Fay’s inflated financial statements. No evidence was presented to prove beyond a reasonable doubt that the financial integrity of any bank was threatened in this case.

(Id. at 12-13.)

Mr. Polishan’s arguments ignore the stipulations made before and during trial. Specifically, defendants stipulated that in January of 1992 Leslie Fay entered into a financing agreement with several financial institutions, all of which were then insured by the Federal Deposit Insurance Corporation. Defendant further stipulated that “[i]n order to induce the banks

to enter into the financing agreements, [Leslie Fay] warranted that its financial statements were correct and fairly presented the financial position of the company.” (Indictment, ¶ 16; emphasis added.) Of course, the financial statements fraudulently inflated the company’s financial performance. It was further agreed that Leslie Fay had warranted that its financial statements “were complete and correct in all material respects and were prepared in reasonable detail and in accordance with Generally Accepted Accounting Principals (GAAP)” (Id.) There were also stipulations that the financing agreements required Leslie Fay to maintain certain levels of consolidated working capital and consolidated net worth “or else a default would occur.” (Id. at ¶ 17.) During the course of the trial, the defense stipulated that officials of Leslie Fay’s lending institutions would testify that, had they known that information submitted by Leslie Fay was fraudulent, they would not have extended the financing. Moreover, the government presented evidence through an expert witness who testified that violations of covenants concerning net worth and working capital were hidden by the fraudulent inflation of the company’s financial results, thereby avoiding the declaration of an event of default. Plainly, the evidence, combined with the stipulations entered into by the defendant, were sufficient to sustain a conviction of bank fraud.

Finally, the evidence was plainly adequate to sustain the wire fraud convictions under Counts 11, 12, and 15 through 20. In this regard, the evidence showed that press releases transmitted by wire in interstate commerce touted the falsified financial results of the company.

In summary, Mr. Polishan has not mounted a viable attack on the findings of guilt made in this matter. Accordingly, he is not entitled to a judgment of acquittal.

B. Motion for a New Trial

1. Sufficiency of the Evidence

Federal Rule of Criminal Procedure 33, in relevant part, provides that “[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.” The district court must exercise its discretion in determining whether a new trial is warranted. See United States v. Console, 13 F.3d 641, 665 (3d Cir. 1993), cert. denied, 511 U.S. 1076 (1994); United States v. Skelton, 893 F.2d 40, 44 (3d Cir.), cert. denied, 498 U.S. 814 (1990). Thus, “[a] court evaluates a Rule 33 motion from a different vantage point than it evaluates a Rule 29 motion for judgment of acquittal.” United States v. Saborit, 967 F.Supp. 1136, 1144 (N.D. Iowa 1997). Unlike a motion for judgment of acquittal, a motion for a new trial on the ground that the verdict is contrary to the weight of the evidence calls upon the trial court to weigh the evidence and evaluate the credibility of witnesses. Id. Nonetheless, “[a] motion for a new trial is not favored and is viewed with great caution.” United States v. Miller, 987 F.2d 1462, 1466 (10th Cir. 1993). “It is a remedy to be used sparingly, reserved for exceptional circumstances, where the evidence preponderates heavily against the verdict or where failure to grant a new trial would result in a miscarriage of justice.” United States v. Fenech, 943 F.Supp. 480, 486 (E.D. Pa. 1996).

In this case, the points made on behalf of Mr. Polishan in his post-verdict briefs were, for the most part, advanced on his behalf at the conclusion of the trial and were considered in reaching the decision that the government had met its substantial burden of proof. To be sure, the points reiterated by Mr. Polishan required intense scrutiny of the record. For example, the fact that Mr. Kenia initially accepted responsibility for the entire fraud, denying that Mr. Polishan was a culpable participant, required that his testimony be weighed with great caution, as did the fact that he had reached a very favorable agreement with the government in exchange for his cooperation. The fact that Mr. Kenia admitted not informing Mr. Polishan of the full extent of the fraud also militated against acceptance of his testimony without corroboration. But there was indeed substantial corroboration in the form of the testimony of divisional controllers, the manager of the Leslie Fay distribution center in Pennsylvania, the former human relations director, and other witnesses. Documentary evidence, including, in particular, memoranda authored by the defendant in connection with the sale of the HEAD division and the financial records for the period ending June 27, 1992 bearing Mr. Polishan's handwritten notations, amply confirm Mr. Kenia's accounts of the defendant's participation in the fraud.

In summary, while I have carefully considered the arguments advanced on behalf of Mr. Polishan, I remain convinced in the soundness of my verdict. The points made by the defendant are not sufficiently compelling as to indicate that the interests of justice would be served by conducting a new trial in this matter.

2. Discovery-Related Matters

Mr. Polishan complains that his ability to prepare for trial was unfairly impaired by the need to review the massive amount of material that had been compiled by the government and made available to him. In particular, he notes the inability to afford to photocopy the documentation amassed by the government. He faults Magistrate Judge Blewitt for failing to have directed the establishment of a document depository to which he would have had access after the close of discovery in December of 1998. He also contends that the Magistrate Judge erred in not compelling the government to identify with specificity Brady material.

Mr. Polishan is not entitled to a new trial on the basis of these discovery-related matters for two reasons. First, he failed to preserve the issues by timely seeking review of Magistrate Judge Blewitt's determinations. And second, Magistrate Judge Blewitt did not abuse his discretion in handling either of these discovery-related matters.

As to the waiver issue, Magistrate Judge Blewitt had authority to decide discovery-related issues by virtue of 28 U.S.C. § 636(b)(1)(A).⁶ With respect to a referral of a matter within the

⁶Section 636(b)(1)(A) provides:

Notwithstanding any provision of law to the contrary -- (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim

(continued...)

magistrate judge's authority conferred by § 636(b)(1)(A), "the magistrate judge's order has the force of law unless appealed." Continental Casualty Co. v. Dominick D'Andrea, Inc., 150 F.3d 245, 250 (3d Cir. 1998).

Local Rule of Court 72.2 provides that "[a]ny party may appeal from a magistrate judge's order determining a non-dispositive pretrial motion or matter in any civil or criminal case in which the magistrate judge is not the presiding judge of the case, within ten (10) days after issuance of the magistrate judge's order, unless a different time is prescribed by the magistrate judge or a judge." (Emphasis added.) In this case, Mr. Polishan did not appeal Magistrate Judge Blewitt's March 11, 1999 decision refusing to establish a document depository and denying the request to compel the government to specifically identify Brady material. Under these circumstances, there was no occasion for further review of the Magistrate Judge's decision, which became final upon the expiration of the ten day appeal period prescribed by Local Rule of Court 72.2.

It has been recognized that, as a general rule, the failure to challenge a magistrate judge's ruling on a matter within the authority conferred by § 636(b)(1)(A) precludes appellate court consideration of the matter. Continental Casualty Co., 150 F.3d at 252-53; United Steelworkers of America v. New Jersey Zinc Co., 828 F.2d 1001, 1007-08 (3d Cir. 1987)

⁶(...continued)

upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

("[P]arties who wish to preserve their objections to a magistrate's order entered pursuant to § 636(b)(1)(A) must file their objections in the district court within ten days as set forth in Fed.R.Civ.P. 72(a).") This waiver rule has been applied in the context of discovery rulings made by magistrate judges in criminal proceedings. See, e.g., United States v. Brown, 79 F.3d 1499, 1503-04 (7th Cir.), cert. denied, 519 U.S. 875 (1996); United States v. Renfro, 620 F.2d 497, 500 (5th Cir.), cert. denied, 449 U.S. 921 (1980).

Although the cases apply the waiver rule in the context of appeals, the same considerations that underlie foreclosing of appellate court review are present where, as here, the matter is first raised in the district court after a verdict. In Brown, supra, the court explained that the waiver rule was intended to prevent a litigant "from 'sandbagging' the district judge by failing to object and then appealing." 79 F.3d at 1504, quoting Thomas v. Arn, 474 U.S. 140, 147 (1985). In the absence of a waiver rule, a district judge may be required to review every issue decided by a magistrate judge, regardless of the parties' satisfaction with the magistrate judge's ruling. The absence of a waiver rule would defeat interests of judicial economy and efficiency that referral of non-dispositive issues to magistrate judges is intended to promote. As explained by the Seventh Circuit, review by a district judge of a magistrate judge decision, "preferably before the initiation of trial, serves the interests of judicial economy by placing the issue before a trial judge who is more intimately familiar with the details of the case than this court could hope to become and is, therefore, in a better position initially to review the merit of the request."

United States v. Reddick, 620 F.2d 606, 607 (7th Cir. 1980). But judicial economy is not served where, as here, a defendant awaits the outcome of a verdict before first raising the issue before the district judge. To allow a party to challenge a magistrate judge's ruling after an adverse verdict has been obtained would disserve the interests of judicial economy.

In this case, trial consumed 35 days, and deliberations lasted for more than one week. To allow Mr. Polishan to now raise a discovery-related issue as a basis for a new trial would be manifestly unfair to the government and wasteful of scarce judicial resources.

In Renfro, the defendant did not challenge a magistrate judge's discovery ruling until after he was found guilty. The appellate court, observing that the delay in raising the issue "deprived the trial judge of his ability to effectively review the magistrate's holding," 620 F.2d at 500, ruled that it would not address the discovery issue on appeal. In this case, Mr. Polishan's failure to raise the discovery issues prior to trial has similarly deprived this Court of an ability to effectively review the magistrate judge's holding. Under these circumstances, application of a waiver rule is plainly warranted.

Even if judicial review of the discovery-related rulings remained available, Mr. Polishan has not shown that the interests of justice warrant a new trial. In this regard, review of Magistrate Judge Blewitt's decisions is limited to ascertaining whether they are "clearly erroneous or contrary to law." 18 U.S.C. § 636(b)(1)(A). Thus, as one court has observed in the context of a magistrate judge's discovery rulings in a criminal case, for the defendant to prevail in his

challenge to the magistrate judge's rulings, the defendant "must show not that the Magistrate Judge *could have* exercised his discretion and granted [defendant's] discovery requests, but rather that [defendant] is entitled to the discovery he seeks as a matter of law." United States v. Cleveland, No. Crim. A. 96-207, 1997 WL 208909, at * 2 (E.D. La. April 28, 1997)(emphasis in original).

Mr. Polishan has not cited any authority holding that a document depository was required to be established in this case. Moreover, the magistrate judge did not abuse his discretion in denying Mr. Polishan's request. It must be remembered that Mr. Polishan had more than two years within which to review the documents in the possession of the government. While the documentation was indeed massive, no showing has been made that the documents could not have been reviewed within the extended period of discovery allowed in this case. While financial constraints may have precluded a carte blanche photocopying of the records, the defendant had the ability to review and identify those documents material to the case. Furthermore, Mr. Polishan could have sought public funding for the cost of obtaining copies of documents. Indeed, the defendant requested and obtained public funding for defense expert witness services, at a cost of nearly \$400,000. It must also be borne in mind that the defendant was a participant in the securities fraud class actions that were brought in the wake of the disclosure of the fraud. He thus had access to transcripts of witnesses and documents produced during the course of that

litigation. Under these circumstances, Mr. Polishan's protests of prejudice due to the volume of material amassed by the government in this case ring hollow. The difficulties encountered by the defendant in assessing the material compiled by the government are simply not a sufficient reason to order a new trial.

With respect to the request that the government identify with specificity Brady material, there is indeed some authority to support the proposition that an open-file policy does not relieve the government of the obligation to identify Brady material. *See, e.g., United States v. Hsia*, 24 F.Supp. 2d 14, 29-30 (D.D.C. 1998) ("The government can not meet its Brady obligations by providing Ms. Hsia with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack. To the extent that the government knows of any documents or statements that constitute Brady material, it must identify that material to Ms. Hsia."); *United States v. McVeigh*, 954 F.Supp. 1441, 1443 (D.Colo. 1997). There is, however, contrary precedents. *See, e.g., United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir.)(“There is no authority for the proposition that the government's Brady obligations require it to point the defense to specific documents within the larger mass of material that it has already turned over.”), *cert. denied*, 522 U.S. 848 (1997); *United States v. Eisenberg*, 773 F.Supp. 662, 687-88 (D.N.J. 1991); *United States v. Bloom*, 78 F.R.D. 591, 617 (E.D. Pa. 1977). As explained in Eisenberg:

Brady is “designed to ‘assure that the defendant will not be denied

access to exculpatory evidence only known to the Government.”
As the Third Circuit has stated, “the [g]overnment is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.”

The Government represents it has complied with its Brady obligations. [Defendant] does not assert that the Government has concealed exculpatory evidence. Rather, he asserts that he should not have to expend the effort required to review a substantial number of documents in order to ascertain whether they contain exculpatory information. He asserts the onus of making such effort should be borne by the Government. The Government represents . . . that counsel for the Defendants spent a substantial amount of time reviewing the documents produced by the Government. Moreover, [Defendant] does not complain that he was denied sufficient access to these documents. The Government has complied with its Brady obligations

773 F.Supp. at 687-88 (emphasis in original).

In this case, the evidence before the Magistrate Judge indicated that defense counsel spent considerable time reviewing the documents made available by the government. These documents were available for a period of two years. Under these circumstances, a determination that the government’s open file policy in this case satisfied its Brady obligations cannot be said to have been clearly erroneous.⁷

⁷Defendant’s prolix motion for new trial baldly asserts a number of other reasons for directing a re-trial of this case. For example, the defense contends that the government failed to provide copies of exhibits during the course of the trial. Defendant, however, does not cite to any part of the record to substantiate this assertion. Moreover, the defense does not cite to any part of the voluminous record to indicate that the matter was brought to the Court’s attention or that

(continued...)

III. CONCLUSION

For the reasons set forth above, defendants' post-verdict motions will be denied. An appropriate Order is attached.

⁷(...continued)

the Court otherwise denied a request that the government produce a copy of a specific document. In the absence of a specific citation to the record, judicial review of such a contention is not practicable. See F.D.I.C v. Schuchmann, 235 F.3d 1217, 1230 (10th Cir. 2000); Grant v. Murphy & Miller, Inc., No. 99 C 5590, 2001 WL 681286, at *13 (N.D. Ill. June 13, 2001); Thomas v. Larson, No. Civ. A. 00-999, 2001 WL 185729, at *9 n.33 (E.D. Pa. Feb. 27, 2001).

In the Brief in support of the "omnibus post-verdict motion," defendant argues that the court "contributed to the document problem" by, inter alia, "erring in certain of its in limine rulings regarding requests for issues or witness lists or other similar accommodations; delaying too long in granting defendant's ex parte request [for public funding of expert witness services] which was granted in January, 2000; by not granting the defense's October 14, 1999 request for an April 2000 trial start date . . . ; denying motion for judgment of acquittal; denying motion for indemnification of defense expenses; denying certain pretrial motions including requests for bill of particulars . . . ; and any other grounds in defendant's motion." (Dkt. Entry 208 at 16-17.) None of these contentions warrants extended discussion. The government was not obligated to provide "issue or witness lists." At the close of each trial day, the government did identify for the defendant the witnesses the government intended to call the following day, thus providing some opportunity to prepare for cross examination. The defense does not cite any instance when it was denied a continuance to prepare to cross examine a witness. As to the start of the trial, the defense agreed that it would be ready by March 1, 2000. Moreover, the trial played out over a period of four months, with significant gaps between trial dates, thus undermining any claim of prejudice as to the commencement of the trial itself. A formal application for public funding of expert witness services was not made until the end of December, 1999, and no prejudice has been shown by the fact that the application was granted in January of 2000. Nor has it been shown that the defense appealed the decision of Magistrate Judge Blewitt denying the request for a bill of particulars or that his denial was clearly erroneous.

In summary, the defense has neither substantiated its claims of prejudicial trial court error by particular reference to the record nor has the defense supported its bald assertions with pertinent authority. Under these circumstances, a new trial for any or all of the litany of reasons conclusorily asserted by the defendant is not warranted.

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

DATE: July ____, 2001

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

VS.

PAUL F. POLISHAN

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3:CR-96-274

(CHIEF JUDGE VANASKIE)

ORDER

**NOW, THIS ____ DAY OF JULY, 2001, for the reasons set forth in the foregoing
Memorandum, IT IS HEREBY ORDERED THAT:**

1. Defendant's Motion for New Trial (Dkt. Entry 198) is **DENIED**.
2. Defendant's Omnibus Post-Verdict Motion (Dkt. Entry 207) is **DENIED**.

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

